

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

NOV 25 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

DANIEL LUGO PEREZ,

Appellant.

)
)
) 2 CA-CR 2005-0083
) DEPARTMENT B
)

MEMORANDUM DECISION

) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20042382

Honorable Paul E. Tang, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena

Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Daniel Perez was convicted of two counts of sexual abuse and five counts of sexual assault. The trial court imposed concurrent, presumptive prison sentences of 1.5 years for each of the sexual abuse convictions. For the five sexual assault convictions, the court sentenced Perez to consecutive, presumptive prison terms, three of which—counts five, six, and seven—were enhanced pursuant to A.R.S. § 13-1406(B). The two longest of the resulting prison terms were for 15.75 years.¹ On appeal, Perez argues the court erred in enhancing those three sentences under this statute. The state concedes the sentences were unlawful.

¶2 The imposition of an illegal sentence constitutes fundamental, prejudicial error. *State v. Joyner*, 215 Ariz. 134, ¶¶ 5, 32, 158 P.3d 263, 266, 273 (App. 2007). We review the legality of a sentence enhancement de novo. *See State v. Rasul*, 216 Ariz. 491, ¶ 20, 167 P.3d 1286, 1291 (App. 2007).

¶3 Section 13-1406(B) requires the court to enhance the sentence of a defendant who is convicted of sexual assault and has a “historical prior felony conviction,” which was defined by A.R.S. § 13-604(V)(2) when Perez committed his crimes. *See* 2003 Ariz. Sess. Laws, ch. 11, § 1. However, the state did not allege before the trial began that Perez had any prior convictions. *See State v. Benak*, 199 Ariz. 333, ¶ 14, 18 P.3d 127, 130-31 (App. 2001) (“[F]undamental fairness and due process require that allegations that would enhance a sentence be made before trial so that the defendant can evaluate his options.”); *see also* § 13-604(P) (state must allege prior conviction before trial).

¹The total period of incarceration imposed was 57.5 years.

¶4 Instead, pursuant to A.R.S. § 13-702.02, the state filed an “allegation of offenses not committed on the same occasion, consolidated for trial,” in which it asserted that separate counts in the indictment would be alleged as prior convictions “[i]n the event the counts are severed for trial.” But the counts were never severed for trial. Consequently, the allegation did not provide adequate notice that the state was seeking an enhanced sentence. *See Benak*, 199 Ariz. 333, ¶ 16, 18 P.3d at 131 (notice of allegation of prior conviction cannot mislead, deceive, or surprise defendant).

¶5 For the reasons stated above, Perez’s enhanced sentences on counts five, six, and seven were illegal. This court may modify an illegal sentence pursuant to A.R.S. § 13-4037(A). *See State v. Gourdin*, 156 Ariz. 337, 339, 751 P.2d 997, 999 (App. 1988) (recognizing statutory authority of appellate court to correct illegal sentence). Because the state has not articulated what bases the trial court would have for imposing anything other than the presumptive sentence on remand, and we can therefore conjure no purpose to be served by remand, we order the consecutive sentences on counts five, six, and seven modified to presumptive terms of seven years on each count. *See State v. Guytan*, 192 Ariz. 514, ¶¶ 8, 37, 968 P.2d 587, 591, 596 (App. 1998) (appellate court may eliminate illegal enhancement and modify judgment to impose sentence court otherwise would have given).

¶6 Affirmed as modified.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

GARYE L. VÁSQUEZ, Judge

JOSEPH W. HOWARD, Judge